STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 95B173

CCRD Charge No. S95P0004

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JACQUELINE WILLIAMS,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH SERVICES, LATHROP PARK YOUTH CAMP,

Respondent.

The hearing in this matter was held on February 18, 1997, in Denver before Administrative Law Judge Margot W. Jones. Respondent appeared at the hearing through Thomas Parchman, assistant attorney general. Complainant appeared at the hearing pro se.

Respondent called the following employees of the Department of Human Services to testify at hearing: John Chifalo; Meghan Brode; and Frank Conder. Complainant did not testify in her own behalf and called no witnesses to testify at hearing.

Respondent's exhibits 1 through 4, 11, 14, and 16 through 20 were admitted into evidence without objection. Respondent's exhibit 15 was admitted into evidence over objection. The parties stipulated to the admission of respondent's exhibits 5 through 8, 10, 12, and 13. Respondent's exhibit 9 was marked but was not offered into evidence at hearing. Complainant did not offer exhibits into evidence at hearing.

MATTER APPEALED

Complainant appealed the termination of her employment with Lathrop Youth Camp.

ISSUES

1. Whether complainant engaged in the acts for which discipline was imposed.

- 2. Whether complainant's conduct constituted violation of State Personnel Board Rules.
- 3. Whether the decision to terminate complainant's employment was arbitrary, capricious, or contrary to rule or law.
- 4. Whether respondent is entitled to an award of attorney fees and costs.

STIPULATED FACTS

At hearing, respondent's motion to deem admitted the requests for admission was addressed as a preliminary matter. Respondent withdrew the requests for admission, numbered 6 and 7. Complainant admitted all respondent's requests. The following facts are admitted.

- 1. Brian Gomez was complainant's appointing authority for purposes of the disciplinary action at the time of her termination from the division of youth corrections.
- 2. Complainant received a corrective action letter dated February 23, 1993.
- 3. The February 23, 1993, corrective action letter was not rescinded or overturned through the grievance process.
- 4. Complainant received a corrective action letter dated December 8, 1993.
- 5. The December 8, 1993, corrective action letter was not rescinded or overturned through the grievance process.
- 6. Respondent withdrew the request for admission.
- 7. Respondent withdrew the request for admission.

- 8. Complainant received a corrective action letter dated March 15, 1994.
- 9. The March 15, 1994, corrective action letter was not rescinded or overturned through the grievance process.
- 10. Complainant received a corrective action letter dated July 25, 1994.
- 11. The July 25, 1994, corrective action was not rescinded or overturned through the grievance process.
- 12. Complainant's annual PACE appraisal for the time period July 1, 1993, to June 10, 1994, was an overall Needs Improvement.
- 13. The 1993-1994 annual PACE appraisal was not changed through the grievance process or otherwise.
- 14. Complainant's interim PACE appraisal for July 1, 1994, to August 1, 1994, was an overall Needs Improvement.
- 15. By letter dated September 15, 1994, complainant was disciplined by Brian Gomez.
- 16. The September 15, 1994, disciplinary action was not rescinded or overturned.

FINDINGS OF FACT

- 1. Complainant Jacqueline Williams (Williams) was employed by the Lathrop Park Youth Camp as a safety security officer I. During the time relevant to this appeal, from 1993 to 1995, Williams worked under the supervision of Meghan Brode and John Chifalo. The appointing authority for Williams' position was Brian Gomez, the director of Lathrop Park and Pueblo Youth Camps.
- 2. During the period relevant to this appeal, Williams was repeatedly counseled, corrected and disciplined about her attendance and punctuality, the safety and security of the facility, the accuracy of her documentation, and her lack of honesty.
- 3. On February 23, 1993, Williams received a corrective action for failing to comply with a Lathrop Park Youth Camp (Lathrop Park)

- client's treatment program. Williams was found to have acted insubordinately in this incident.
- 4. On December 8, 1993, Williams received another corrective action for failing to properly supervise Lathrop Park clients.
- 5. On February 4, 1994, Williams received a third corrective action. The corrective action addressed Williams' actions jeopardizing the safety and security of the facility, tardiness, and failure to report her absence from work due to illness.
- 6. On March 15, 1994, Williams received a corrective action for jeopardizing the safety and security of the facility by leaving doors unlocked in areas where she was assigned responsibility for youth at the camp.
- 7. On June 14, 1994, Williams received another corrective action. This corrective action was for repeated tardiness, failure to follow the assigned work schedule, falsifying her time sheet, and failing to call in to report that she would arrive late for work.
- 8. During 1994, in addition to the above referenced corrective actions, Williams was advised in writing by her supervisor, Meghan Brode, of job performance deficiencies on three occasions. These communications pertained to Williams' punctuality in arriving for her scheduled work shift and the conduct of client meetings and group sessions, failure to use proper group direction, falsifying of client records, facilitation skills with the clients and inappropriate interpersonal communications with the clients.
- 9. On September 15, 1994, Williams received a disciplinary demotion for two months from grade 73 step 6 to grade 73 step 4. The disciplinary demotion was imposed for failure to prepare "Institutional Progress Reports" on clients assigned to Williams' care.
- 10. During Williams' employment at Lathrop Park, she received annual performance ratings. The ratings covering the period 1993 through 1995 rated her job performance as "needs improvement".
- 11. In February and March, 1995, incidents were brought to Brian Gomez' (Gomez) attention that lead to his decision to consider disciplinary action. Williams falsified a client's records. Clients at the facility complained to managers that Williams was not meeting with them despite notations in their records that she met with them. In order to clarify this situation, Williams'

- clients were asked to initial notations made in their file by Williams following her meetings with them. A client's file reflected Williams forged the client's initials.
- 12. Another incident brought to Gomez' attention concerned Williams' tardiness for work on February 2, 1995. Williams overslept and was 35 minutes late for work. She awakened on February 2, 1995, only after her supervisor John Chifalo came to her house and knocked on her door.
- 13. Another incident brought to Gomez' attention pertains to Williams' failure to prepare for a group meeting with clients of the Center. Williams was required to meet with a group of clients and lead a discussion. Williams was expected to prepare for the group meeting. Prior to the start of her shift, Meghan Brode, her supervisor asked her whether she was prepared for her group meeting. Williams indicated to Brode that she was prepared. However, Brode learned subsequently that Williams was not prepared for the group meeting and only reviewed the magazines, upon which the group's discussion was based, during the meeting.
- 14. Gomez also learned that Williams was repeatedly instructed to comply with the dress code. Lathrop Park employees are required to wear navy or black sweaters with their uniforms. Williams failed to comply on an occasion when she wore a multi-colored sweater.
- 15. A final incident caused Gomez to consider disciplinary action. Williams failed to properly document her contact with a client. She subsequently documented the contact with the client without accurately reflecting the date on which the documentation occurred.
- 16. Gomez held R8-3-3 meetings with Williams on February 27 and April 20, 1995. At these meetings, Williams was provided the opportunity to respond to the allegations of misconduct and poor job performance. With regard to the allegation that Williams was tardy for work on February 2, 1995, Williams advised Gomez that her tardiness was addressed in the course of discussions about a job performance rating. She asserted that the matter was resolved in the job performance rating process and that she would not discuss it further. Additionally, she explained that she did not forge a client's initials on the client's record. She took alternate stances on the question whether she was prepared to lead a group of clients in discussion. She explained that she was prepared for the group meeting and that the group meeting did not take preparation because the clients do all the work. Williams further agreed that she did not comply with the dress code. She explained that her mother purchased a multi-colored sweater for her to wear with her

uniform and she maintained that respondent's concern about the dress code was unreasonable in light of the fact that employees are required by regulation to wear blue shirts but are permitted to wear turquoise shirts.

- 17. Gomez reviewed Williams' employment record. He considered Williams' job performance ratings. He also reviewed the corrective actions which were imposed on Williams during 1993 and 1994. Gomez was impressed by the fact that the issues which came to his attention during February and March, 1995, were the same issues that had been addressed with Williams repeatedly during the preceding two year period.
- 18. Gomez decided to terminate Williams' employment as a safety security officer. He decided that the prior corrective and disciplinary actions, the performance ratings, and the numerous counseling sessions did not cause Williams to perform her job competently. Gomez decided that termination of Williams' employment was the appropriate action on this occasion.
- 19. By letter dated May 22, 1995, Williams was advised that her employment was terminated. On May 30, 1995, Williams filed a timely appeal of her termination with the State Personnel Board. Williams alleged that her termination was discriminatory on the basis of her race. The appeal was referred to the Colorado Civil Rights Division for investigation of Williams' allegation of race discrimination.
- 20. On May 2, 1996, the Colorado Civil Right Division rendered an opinion of "no probable cause" to credit Williams' claims of race discrimination. Williams did not appeal the "no probable cause" determination. Therefore, an appeal hearing was scheduled before the undersigned administrative law judge to consider Williams' claim that the termination of her employment was arbitrary, capricious, or contrary to rule or law.
- 21. On July 8, 1996, respondent timely filed its prehearing statement. On July 10, 1996, Williams moved for an extension of time in which to file a prehearing statement on the grounds that she was seeking legal counsel and wanted her representative to prepare the prehearing statement. On July 16, 1996, an order was entered granting Williams an extension of time to July 29, 1996, to file a prehearing statement.
- 22. Pursuant to notice dated June 18, 1996, an evidentiary hearing was scheduled for July 29, 1996. On June 25, 1996, respondent moved to continue the hearing date on the basis that its witnesses were unavailable. On July 8, 1996, the hearing date of July 29,

- 1996, was continued. On July 15, 1996, Williams' representative, a paralegal, sought permission to represent Williams in the proceeding. Respondent objected to a paralegal being permitted to represent Williams in these proceedings as it would constitute the unauthorized practice of law. The July 15, 1996, motion for a non-lawyer to represent Williams was denied on July 23, 1996.
- 23. The hearing convened by telephone on July 24, 1996. During the telephone commencement, complainant contended that she was not prepared to set a hearing date because she could not appear at hearing without an attorney. On July 24, 1996, a hearing date of October 28, 1996, was set for the evidentiary hearing. The parties were advised that a status conference would be held via telephone on August 28, 1996. At that time, Williams was expected to advise the administrative law judge and opposing counsel about the status of her efforts to retain counsel and about her intention to proceed with her appeal.
- 24. Respondent was prepared to proceed with the telephone conference on August 28, 1996. Williams was not available for the telephone status conference on August 28, 1996. Williams was left a telephone message on August 28, 1996, that the administrative law judge attempted to reach her for the status conference.
- 25. A second telephone status conference was scheduled for September 4, 1996. Williams was sent notice of the second telephone status conference on August 28, 1996. Respondent was prepared to proceed with the status conference call. Williams was not available for the status conference.
- 26. On September 5, 1996, respondent moved to dismiss the appeal as abandoned in light of Williams' failure to make herself available for the August 28 and September 4, 1996, telephone status conference. On September 18, 1996, Williams responded to the motion to dismiss. She alleged that she attempted to retain counsel and was unsuccessful. Williams contended in the motion that she intended to pursue the appeal and that the motion to dismiss the appeal as abandoned should be denied. Williams requested a three week extension of time to retain counsel and an extension of time in which to file a prehearing statement.
- 27. By order dated September 23, 1996, Williams was directed to file a prehearing statement on or before October 7, 1996. She was also given a three week extension of time in which to retain counsel.
- 28. On October 10, 1996, Joseph Lasavio, attorney at law, entered

- his appearance in this matter as Williams' representative. Williams also filed a prehearing statement on this date. In the prehearing statement, Williams raised issues of discrimination based on race, sex, and religion and she alleged that the termination of her employment was retaliatory.
- 29. On October 9, 1996, respondent moved to strike issues and witnesses and to exclude evidence from hearing. Respondent contended that since Williams failed to appeal the "no probable cause" determination made by the Colorado Civil Rights Division, she could not raise the issue of discrimination at hearing in this matter. Respondent further contended that Williams identified six witnesses in her prehearing statement who were endorsed to testify about respondent's discriminatory treatment. Finally, respondent contended that Williams sought relief which was not within the authority of the Board to grant.
- 30. On October 18, 1996, respondent moved to exclude physical and documentary evidence on the grounds that Williams intended to introduce into evidence at hearing exhibits which were not provided to respondent with Williams' prehearing statement.
- 31. Respondent's October 9 and 18, 1996, motions were granted.
- 32. On October 22, 1996, Williams' attorney moved to withdraw as attorney of record in this matter. On October 23, 1996, Williams' counsel's request to withdraw as the attorney of record was granted.
- 33. On October 23, 1996, respondent attempted to communicate with Williams to determine if she intended to appear at the October 28, 1996, hearing. Respondent sought to minimize the expense incurred by the agency in appearing in Denver for the hearing if Williams did not intend to pursue her appeal. Respondent's witnesses were required to travel from Walsenburg, La Vita, and Pueblo, CO to attend the hearing. On October 23, 1996, Williams refused to speak to respondent's counsel about her intentions with regard to the October 28, 1996, hearing.
- 34. Williams refused to speak with respondent's counsel on October 23rd, however, on October 22, 1996, the prior day, Williams mailed to the State Personnel Board a motion objecting to her attorney's withdrawal and a request to continue the October 28, 1996, hearing date. The letter was received at the Board on October 28, 1996.
- 35. Respondent appeared at the October 28, 1996, hearing prepared to proceed. Williams appeared at the hearing. She was not prepared to proceed. Respondent objected to the motion to continue

the hearing. Respondent contended that if the motion to continue was granted costs should be assessed against Williams for costs incurred by respondent in having its witnesses appear at the hearing.

- 36. Williams contended that the hearing should be continued because she could not proceed at the hearing without legal representation. She contended that she was placed at a disadvantage since her attorney was permitted to withdraw as counsel of record just prior to the October 28, 1996, hearing date. She claimed that she was attempting to retain other counsel to represent her at the hearing.
- 37. On October 28, 1996, the motion to continue the hearing date was granted. Respondent's motion to assess costs against Williams was granted.
- 38. By notice dated November 7, 1996, the parties were advised that a hearing was scheduled for February 18, 1997.
- 39. On December 17, 1996, Williams was served with requests for admission. Williams did not respond to the discovery request. On January 27, 1997, respondent moved to have the requests for admission deemed admitted because of Williams' failure to respond. On February 10, 1997, an order was entered holding in abeyance ruling on respondent's motion.
- 40. At hearing on February 18, 1997, Williams appeared pro se. As a preliminary matter, respondent's motion to deem admitted the requests for admission was addressed. Williams did not respond to the requests for admission because she claimed that she did not understand the document. At hearing, Williams reviewed the requests for admission, understood the document and admitted all the requested admissions.

DISCUSSION

Certified state employees have a protected property interest in their employment. The burden is on respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

Respondent established by a preponderance of the evidence that complainant engaged in the conduct for which discipline was imposed. The conduct was proven to constitute violation of R8-3-3 in that it constituted a failure to comply with standards of efficient service or competence, wilful misconduct and a wilful failure to perform duties assigned. The evidence further established that in light of complainant's employment record, which included "needs improvement" employment ratings during 1994 and 1995, five corrective actions during 1993 and 1994, and a disciplinary action in 1994, the decision to terminate complainant's employment in May, 1995, was neither arbitrary, capricious, or contrary to rule or law.

Respondent seeks an order awarding attorney fees and costs under section 24-50-125.5, C.R.S. (1988 Repl. Vol. 10B). This section provides that an award of attorney fees and costs may be made if it is found that the appeal was instituted frivolously, in bad faith, maliciously, as a means of harassment or is otherwise groundless.

Based on the evidence contained in the record, it is concluded that complainant failed to use reasonable diligence to prosecute the appeal. Despite her problems in retaining counsel to represent her at hearing, complainant failed to take reasonable action to preserve her rights on appeal. In so doing, she caused unnecessary delay, inconvenience, and expense in the prehearing process. To this extent, it is found that her appeal was instituted frivolously and in bad faith.

CONCLUSIONS OF LAW

- 1. Respondent established by preponderant evidence that complainant engaged in the acts for which discipline was imposed.
- 2. Respondent established that the conduct proven to have occurred constituted violation of R8-3-3.
- 3. Respondent's decision to terminate complainant's employment was neither arbitrary, capricious, nor contrary to rule or law.

4. The appeal in this matter was instituted frivolously and in bad faith. Therefore, respondent is entitled to an award of reasonable attorney fees and costs incurred during the prehearing process resulting from complainant's failure to act reasonably and with diligence in prosecuting the appeal.

ORDER

- 1. The action of the agency is affirmed.
- 2. The appeal is dismissed with prejudice.
- 3. Respondent is awarded reasonable attorney fees and costs incurred as a result of complainant's actions taking frivolously and in bad faith during the prehearing process.

DATED this ____ day of February, 1997, at Denver, Colorado.

Margot W. Jones Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of February, 1997, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Jacqueline Williams 309 Kansas Ave. Walsenburg, CO 81089

and to the respondent's representative in the interagency mail, addressed as follows:

Thomas Parchman Assistant Attorney General Department of Law 1525 Sherman St., 5th Floor Denver, CO 80203